White Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 280.

THE GUARDIAN ASSURANCE CO. LTD. OF LONDON,
PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT THEREOF.

HECTOR H. SCOVILLE,
C. L. BOUVÉ,
For Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 280.

THE GUARDIAN ASSURANCE CO. LTD. OF LONDON,
PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM.

Comes now Domingo Quintana, defendant in error, and respectfully moves the court to dismiss the writ of error in the above-entitled cause on the ground that the record therein is defective in that it contains no bill of exceptions.

Or, should the court see fit to deny the above motion to dismiss, the defendant in error moves to affirm the judgment of the court below on the ground that it is manifest that the writ of error issued in this case was taken for delay only.

HECTOR H. SCOVILLE,
C. L. BOUVÉ,
For Defendant in Error.

To the attorney of record for the plaintiff in error in the above-entitled case:

You are hereby notified that the defendant in error in the above-entitled case will on Monday, the 18th day of November, A. D. 1912, on the meeting of the Supreme Court of the United States for that day, or as soon thereafter as counsel may be heard, submit for the consideration of the court the foregoing motion and the brief thereon hereto attached.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 280.

THE GUARDIAN ASSURANCE CO. LTD. OF LONDON,
Plaintiff in Error,

vs.

DOMINGO QUINTANA, *Defendant in Error.*

Brief in Support of Motion to Dismiss or Affirm.

Comes now the defendant in error and in support of the above motion to dismiss or affirm respectfully says:

On the 3d day of April, 1911, of the October term, 1910, defendant in error filed his motion to docket and dismiss this case, having produced and filed with the clerk of this court the certificate required by rule 9. On Monday, April 24, 1911, said motion was denied by this honorable court in an order reading as follows:

> "GUARDIAN ASSURANCE COMPANY LIMITED OF LONDON, *Plaintiff in Error,*
> *vs.*
> DOMINGO QUINTANA.
>
> "Motion to docket and dismiss denied without prejudice to a renewal of same if case is not docketed within a reasonable time after the bill of exceptions is settled."

Thereafter and on the 3d day of May, 1911, the case was docketed.

The record now docketed and before this court is certified

to by the clerk of the District Court for Porto Rico as follows:

> "I, Rafael Guillermety, * * * do hereby certify the foregoing pages, numbers 1 to 27, inclusive, to be a true and correct copy of certain proceedings in the above-entitled cause, as the same remain of record on file in my office as called for by the præcipe filed by counsel for the appellant, copy of which præcipe is attached hereto." * * *

There is nothing in the papers to show that a copy of the præcipe was served on the appellee or defendant in error or his counsel, as provided by paragraph 1 of rule 8 of this court.

The step following the filing of the præcipe appears by Journal entry of January 25, 1911:

> (Title of Cause.)
>
> By consent of the respective attorneys for the parties in the above-entitled cause the hearing of the objections to the bill of exceptions filed in this cause is set for tomorrow, Thursday, Jan. 26th, 1911, at 10 o'clock.

As appears from the papers docketed here and from the certificate of the clerk of the United States District Court for Porto Rico, hereinafter appearing as "Exhibit A," the bill of exceptions was still unsettled on April 3, 1911, the date of the motion of the defendant in error to docket and dismiss. The order denying that motion appears to have looked toward the prompt settlement of the bill of exceptions and the docketing of the record within a reasonable time thereafter. No bill of exceptions has ever been filed by the plaintiff in error in this case, nor has the plaintiff ever settled or attempted to settle said bill, although over two full terms have passed since the issuance of said order by this court, all of which fully appears from the following certificate of the clerk of the District Court of the United States for Porto Rico, herein designated as "Exhibit A" and filed as an original exhibit in support of this motion:

IN THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

No. 734. Law.

DOMINGO QUINTANA, *Plaintiff*,

vs.

THE GUARDIAN ASSURANCE COMPANY LIMITED OF LONDON, *Defendant*.

I, Rafael Guillermety, clerk of the District Court of the United States for Porto Rico, hereby certify that judgment was entered in the above-entitled cause in favor of the plaintiff and against the defendant the third day of December, 1910, in the sum of seven thousand dollars ($7,000) and interest.

I further certify that on the tenth day of January, 1911, a writ of error to the Supreme Court of the United States was signed by the judge of this court, a supersedeas bond having been approved by the court.

I further certify that on the sixteenth day of February, 1911, a bill of exceptions was tendered by the defendant and plaintiff in error in said cause, and that thereafter on the twentieth day of February, 1911, objections to the approval of said bill of exceptions were filed by the plaintiff.

I further certify that on the fourth day of April, 1911, an order was entered on the Journal of said court containing the hearing of the objections to said bill of exceptions and the allowance on approval of the same until the April term, 1911, of this court. A true and correct copy of said order being as follows:

Order Continuing Until Next Term of Court the Allowance and Approval of Bill of Exceptions.

In view of the illness of the judge of this court it is hereby ordered that the allowance and approval of

the bill of exceptions in the above-entitled cause, heretofore under consideration, is hereby continued over to the approaching April term of this court.

(Signed) JOHN J. JENKINS, *Judge.*

I further certify that the April term of this court was opened pursuant to order of court on the fourteenth day of August, 1911, the Hon. Paul Charlton presiding, and that said term was closed on the seventh day of October, 1911, without any action being taken in regard to the approval of said bill of exceptions and without any request being made therefor. A general order was entered at the close of said term as follows:

In re Continuance of Cases.

Order.

And now on this 7th day of October, A. D. 1911, this being the last day of the April, 1911, term of this court in this district, it is

Ordered, that any and all matters not finally determined or settled, and rights which should or may be lost by the lapsing of the term, are hereby continued until the next term, to all intents and purposes as if the numbers and titles of the same were herein set out.

Given on this 7th day of October, A. D. 1911.

(Signed) PAUL CHARLTON, *Judge.*

I further certify that the October term, 1911, of this court was opened on Monday, October 9, 1911, and was adjourned without day on April 13, 1912.

I further certify that no action has been taken by this court in regard to the approval and allowance of said bill of exceptions up to the present time; that the objections thereto have never been heard, and that no request has ever been presented to the court for the approval and allowance of said bill of exceptions as appears from the records of the court since the fourth day of April, 1911.

In witness whereof I have hereunto set my hand and affixed my official seal this 4th day of October, A. D. 1912, in the one hundred and thirty-seventh year of the Independence of the United States of America.

Attest:

RAFAEL GUILLERMETY, *Clerk*,

[SEAL.] By SUSANNA ALDAO, *Deputy*.

In the order of this court of April 24, 1911, it is specifically made to appear that the motion to docket and dismiss was denied on the assumption that the plaintiff in error would settle the bill of exceptions and docket the case within a reasonable time thereafter. The order certainly did not look to the docketing of papers containing in themselves nothing on which this court could pass, or the continued failure on the part of the plaintiff in error for more than a year and a half to take steps in the District Court of Porto Rico, which would enable him to settle the bill of exceptions and docket the case in accordance with the terms of the order.

It is respectfully urged that the facts herein shown constitute ample ground for a dismissal of the writ of error, or for affirmance on the ground that it is obvious that the writ was taken for delay only.

Respectfully submitted,

HECTOR H. SCOVILLE,
C. L. BOUVÉ,
For Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 280.

THE GUARDIAN ASSURANCE COMPANY OF LONDON, LIMITED, PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This was an action at law by Domingo Quintana, as plaintiff, to recover from The Guardian Assurance Company, Limited, defendant below and plaintiff in error here, the amount of two certain fire insurance policies aggregating $7,000. The

In

execution of the policies and the destruction by fire of the goods insured was admitted by defendant, but liability to pay was denied on the ground that the fire "was intentional" and "originated by the connivance and design of the plaintiff and those acting under his directions and instructions," and that in any event the true value of the goods insured did not exceed "the sum of three thousand ($3,000) dollars" (R., 3).

The issues thus raised first came on for trial before the Honorable John J. Jenkins, United States District Judge for Porto Rico, and a jury November 25, 1910 (R., 7), and "at the conclusion of the testimony of the witnesses for the parties" and under appropriate instructions by the court the case was submitted to the jury for its verdict on November 28, 1910 (R., 9). Failing to agree upon a verdict the jury was discharged November 29, 1910, and the cause directed to "be placed upon the trial calendar" (R., 10).

December 2, 1910, without other notice to the defendant or its attorney of record, the retrial of the case was peremptorily set for the following day, viz., December 3, 1910, at 10 o'clock a. m. (R., 10).

On the day so fixed for the retrial of the case the attorney for defendant, by a written motion duly filed in the cause, called the attention of the court to the "uniform practice" existing from the establishment of the court, in 1900, under which "civil

cases in which juries have failed to agree have been continued to the following term, when a new and different jury would be empaneled for the trial thereof," and to the further fact that because of the known existence of such practice, the witnesses for defendant, nearly all of whom are workingmen residing in or near the town of Yabucoa (where the alleged loss occurred), which is fifty miles distant from the city of San Juan, where this (district) court is held, and between (R., 10) which (points) there is no railroad communication;" had been discharged from further attendance and had returned to their homes, the only permissible and possible "legal mileage" under which they could be returned to the court, being "by means of vehicles hauled by horses" (R., 11); that if forced to trial on the day fixed by the court the defendant would "be deprived of the opportunity to make defense in this cause and will be denied a fair and impartial trial" (R., 13).

The names and residences of the desired witnesses were specified in the body of the motion, as were also the numbers and titles of other cases at issue and pending for trial at the then current term, "which, in accordance with the uniform practice of this (district) court, should be tried before the retrial of this case" (R., 11), and it was prayed that

> "if the court should in the exercise of its discretion, see fit to depart from the rule and practice of long standing, above re-

ferred to, and require this cause to be tried at or during the present term, that it shall give to the defendant at least five days within which to bring its witnesses to the trial" (R., 13).

It appears from the journal entry of December 3, 1910 (R., 13), that upon the call of the case for further trial the attorney for the defendant brought the above motion to the attention of the trial court, by which same was promptly overruled, and to this "ruling of the court the defendant duly objects and excepts" (R., 13).

A jury having been empanelled and sworn to retry the cause, the attorney for defendant retired from the court-room, and the witnesses for plaintiff having given their testimony, in "default of any defense in the case the jury is (R., 13) directed by the court to bring in a verdict for the plaintiff in the amount claimed in the complaint," which was done, and judgment, with execution, immediately entered thereon (R., 13).

Within ten (10) days thereafter defendant prayed and was allowed a writ of error from this Honorable Court to operate as a *supersedeas* upon the giving of bond in the sum of $11,000 (R., 15). Such bond was tendered and approved December 21, 1910 (R., 17).

A bill of exceptions (form not shown) was subsequently (February 16, 1911) tendered on

behalf of the defendant company for settlement, and the hearing of objection thereto was set by consent for January 26, 1911 (R., 18). Apparently the court was unable to settle the same on the day so fixed, for it appears that on the 4th of April, 1911, and "In view of the illness of the judge of this (district) court," the court ordered that the matter be "continued over to the approaching April term of this (district) court" (R., 18).

The writ of error, citation and the proof of service of the latter all bear date of January 10, 1911 (R., 20).

April 3, 1911, in the above posture of the matter the defendant in error here, Quintana, moved this Honorable Court to docket and dismiss the cause under Rule 9 of the Rules of Practice. That motion was denied April 24, 1911, in the terms set forth on page *3* of defendant in error's "Brief in support of motion to dismiss or affirm."

April 5, 1911, the day after the entry of the above order of continuance, the learned trial judge (Jenkins) left Porto Rico for the United States, where he died June 10, 1911, and the Honorable Paul Charlton having been duly appointed and qualified as his successor, on the 14th day of August, 1911, opened the April, 1911, term of said District Court for Porto Rico. Since the last-

mentioned date nothing further has transpired in that court in connection with this cause.

Meanwhile, on May 3, 1911, the transcript of the record in the cause, which *ex necessitati rei* does not contain any technical bill of exceptions, was filed in this court.

Defendant in error now moves to dismiss the writ of error because the record "contains no bill of exceptions," or to affirm the judgment of the court below because the writ of error "was taken for delay only."

ARGUMENT.

It is respectfully submitted that the motion to dismiss or affirm should be denied and as defendant in error by his said motion has made it necessary for the court to open the record we respectfully suggest and move upon the facts plainly appearing that the judgment of the District Court of Porto Rico which is drawn in question by the writ of error herein should be reversed and the cause remanded to said District Court for further proceedings.

I.

No question as to the jurisdiction either of this court or of the United States District Court for Porto Rico is involved.

II.

It plainly appears from the transcript of the record that the plaintiff in error duly tendered his bill of exceptions and that the same was being held under advisement by the learned trial judge at the date of his death.

Section 219 of the Code of Civil Procedure, Porto Rico, in force July 1, 1904, and at the date of the trial below, provides that—

> "A judge or judicial officer may settle and sign a bill of exceptions after as well as be-

> fore he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from said island, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may by its orders or rules direct. Judges, judicial officers, and the Supreme Court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions."

These provisions are only applicable to trials before the United States District Court for Porto Rico, "as near as may be," and neither said district court nor said supreme court appear to have provided any further rules of their own on the subject. In such a case the general rule is that "where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the (trial) judge, a new trial will be granted."

> Hume *vs.* Bowie, 148 U. S., 245, 253, citing numerous cases.

Owing to the pendency of the cause in this court on a duly perfected writ of error, it has been thought to be at least undesirable to move for further proceedings in or before the United States District Court for Porto Rico.

III.

It is well settled that with respect to errors apparent on the record no formal or technical bill of exceptions is necessary to enable the appellate court to exercise its powers.

Mohne Plow Co. *vs.* Webb, 141 I. S., 616, 622, 623, citing:

Baltimore & Potomac R. R. *vs.* Trustees, &c., &c., 91 U. S., 127.

Bennett *vs.* Butterworth, 11 Howard, 669, 675.

Young *vs.* Martin, 8 Wallace, 354, 357.

Clinton *vs.* Missouri Pac., 122 U. S., 469, 474.

Here the plaintiff in error asserts and seasonably assigned as error the arbitrary action of the trial court "in overruling the motion of defendant for a reasonable time within which to prepare for the retrial of this (the) cause" (R., 15).

As above stated, contrary to established practice and without preliminary notice of intention so to do, the trial judge on December 2, 1910, set the case for retrial at ten o'clock on the following day. The attorney for defendant promptly made known to the trial court the absence of his witnesses from the place of trial and the impossibility of securing their attendance on such short notice and moved for a reasonable delay, "at least five days," to en-

able him to communicate with and bring such witnesses into court (R., 13). This motion was overruled and exception to the ruling was duly noted on the journal of the court (R., 13).

If such action of the trial judge was error, as we think it was, it is error apparent on the record and no bill of exceptions is necessary to secure its correction here.

The Constitution of the United States (article V, amendments) declares that "no person" within its protecting shadow "shall * * * be deprived of * * * property without due process of law."

To mulch a person, natural or artificial, by the judgment or decree of a court without having first afforded such person opportunity to be heard in defense is contrary to fundamental principles for the administration of justice and constitutes a denial of due process of law as understood and practiced in civilized and enlightened communities.

In Roller *vs.* Holly, 176 U. S., 398, the question was whether notice of a suit pending served on defendant in Virginia on December 30 requiring his appearance at the place of trial in Texas on January 5, such length of notice being in accord with the provisions of the Texas law, constituted due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States.

This court, speaking through Mr. Justice Brown, said:

(Page 409:)

"That a man is entitled to some notice before he can be deprived of his liberty or property is an axiom of the law to which no citation of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose. *Davidson vs. New Orleans,* 96 U. S., 97; *Hagar vs. Reclamation District,* &c.,111 U. S.,701, 712. * * * In the case of a witness subpœna the command of the writ is that the party served shall lay aside all his business and excuses, and make his way to the court with the utmost dispatch, or at least present himself upon the return day of the writ. * * *

"The precise time (having regard to parties defendants) will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man * * * (defendant) should be allowed not only ample time to obtain legal advice and assistance, *but also to collect his evidence, and even the convenience of witnesses should be considered* (italics ours); and therefore, in general, several days should intervene between the time of summons and hearing" * * * (Citing 2 Chitty's General Practice, 175).

It was held under the circumstances "and considering the distance between the place of service and the place of return, that five days was not a reasonable notice, or due process of law," and the

judgment of the lower court was reversed and the case remanded for further proceedings.

In Hovey *vs.* Elliott, 167 U. S., 409, where a defendant after answer filed refused to obey an order of the court and, by way of punishment for his contempt, his answer was stricken from the files and a decree *pro confesso* passed, this court held such decree void for want of due process of law, and speaking through its present Chief Justice, said (p. 414):

> "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." * * *

(Citing McVeigh *vs.* United States, 11 Wallace, 259:)

> "The order in effect denied the respondent a hearing. * * * The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." * * * (And quoting from Windsor *vs.* McVeigh, 93 U. S., 277, as follows:)
>
> "* * * Wherever one is assailed in his person or his property, there he may de-

> fend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. Until notice is given, the court has no (p. 415) jurisdiction in any case to proceed to judgment. * * * But notice is only for the purpose of affording the party an opportunity of being heard upon the claim of the charges made. * * * A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. * * * It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

This language but expresses the most elementary conception of the judicial function. * * *

(Page 417:)

> "Can it be doubted that due process of law signifies a right to be heard in one's defense? * * * If this be true * * * how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is

> the only one possessing power to disregard it. If such power exists then in consequence of their establishment, to compel obedience to the law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."
> * * *

Upon this and much more equally as pointed and pertinent the judgment there assailed which had been rendered in disregard of the answer filed and of the proofs taken in its support, was held to be "void for want of jurisdiction" and subject therefore to collateral attack.

Other cases to the same effect might readily be cited, but consideration of those above would seem to afford sufficient precedent upon which to found a reversal of the judgment in the case at bar.

As in Hovey *vs.* Elliott, so in the case at bar, the proceedings seem to have been complicated with proceedings in or for contempts (see Record, page 18, second phrase of first sentence). Whether the contempts were of party or counsel, and the character thereof does not appear, but it would probably not be amiss to surmise that whatever their character or source they probably gave rise to some personal illfeeling even on the part of the learned trial judge, and may have conduced to the more ready making of the seemingly arbitrary and unjudicial orders of December 2 and 3, which in effect denied the defendant opportunity to present its defense by witnesses cognizant of the facts which concern the plaintiff's claim.

It cannot be that the defendant was in fault because at the conclusion of the first trial its witnesses were permitted to return to their homes and to their respective occupations. Such as appears from the motion for delay had theretofore been the unbroken custom in the Federal District Court for Porto Rico from its establishment. The facilities for communication and travel between the place of trial and the place of their residence were such as precluded their immediate return to the former. To deny the reasonable time necessary to secure their attendance was to deny defendant opportunity to be heard in its defense, and the entry of judgment against it in the absence of such hearing was but to deprive it of its property without due process of law.

Further argument of the facts which the record so plainly discloses and about which there neither is nor can be room for controversy, would seem to be useless.

We therefore submit, in the interest of justice and for the preservation of the fair fame of her courts, the judgment at bar should be reversed and the cause remanded whence it came for further proceedings.

FREDERIC D. MCKENNEY,
JOHN SPALDING FLANNERY,
WILLIAM HITZ,
Attorneys for Plaintiff in Error.

NOVEMBER, 1912.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 280.

THE GUARDIAN ASSURANCE COMPANY, LTD., OF LONDON, *Plaintiff in Error,*

vs.

DOMINGO QUINTANA, *Defendant in Error.*

Affidavit.

Francis H. Dexter, being duly sworn, upon his oath says that he is a member of the bar of the District Court of the United States for Porto Rico, and that he is one of the attorneys for the plaintiff in error.

He further states that the Honorable Judge John J. Jenkins, former judge of the District Court of the United States for Porto Rico, departed from Porto Rico upon the occasion of his last illness on the fifth day of April, 1911, and that he died on the tenth day of June, 1911, as affiant has been informed by friends of the said judge and as appears by other data.

FRANCIS H. DEXTER.

Subscribed and sworn to before me this first day of November, 1912.

[SEAL.] RAFAEL GUILLERMELY,
By L. A. GROSS, *Deputy.*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 280.

THE GUARDIAN ASSURANCE CO., LTD., OF LONDON,
PLAINTIFF IN ERROR,

vs.

DOMINGO QUINTANA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

The plaintiff in error opposes the granting of this motion to dismiss or affirm on two grounds:

1. That it was through no fault of the plaintiff in error that the bill of exceptions was not settled, but because the judge to whom it was submitted for settlement died before it was settled; that there was no procedural machinery in the Supreme Court of Porto Rico which under section 914 of Revised Statutes the Federal court of that district was to follow "as near as may be" to meet this situation; that plaintiff in error was therefore left in the position of having

"lost the benefit of his exceptions" without his fault, and, consequently, he is entitled to a new trial under the "general rule."

The presence or absence of rules in the Supreme Court of Porto Rico governing the settlement of bills of exceptions in no way affected the situation which confronted the plaintiff in error when Judge Jenkins died leaving the bill unsettled. It is settled law that the practice and rules of State courts do not apply to proceedings taken for the purpose of reviewing in this court a judgment rendered in the lower Federal courts, and that such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the practice, pleadings, and forms and modes of proceeding in the Federal courts which are required by section 914 to conform "as near as may be" to the practice in the courts of record of the various States. Such proceedings are to be regulated by acts of Congress or, when they are silent, by methods derived from the common law or from the rules and practice of the courts of the United States (*Ex parte* Chateaugay Ore and Iron Co., 128 U. S., 544, 553, 555; 32 Law Ed., 508, 511, 512; Nudd *vs.* Burrows, 91 U. S., 426; 23 L. Ed, 286; Indianapolis, etc., Ry. Co. *vs.* Horst, 93 U. S., 291; 23 Law Ed., 898).

Plaintiff in error states that "in such a case as this" the general rule is that a new trial will be granted, and cites Hume *vs.* Bowie, 148 U. S., 245, 253, in support of this contention. Hume *vs.* Bowie is not, however, such a case as this and does not afford an example of the application of the general rule. In that case the judge died before the bill of exceptions was settled, and rule 64 of the Supreme Court of the District of Columbia specially provided that when a judge was unable to settle a bill of exceptions and the parties were unable by their counsel to do so a new trial was to follow as a matter of course.

The general rule was there stated by Chief Justice Fuller in the following terms: "Ordinarily where a party without

laches on his part loses the benefit of his exceptions through the death or illness of the judge a new trial will be granted." Here no rights were lost by the plaintiff in error because, as appears of record, the judge ordered that the matter of the settlement of the bill of exceptions be continued to the April term, 1911 (R., 18). It might have been otherwise had there been no such order, had the plaintiff in error been restricted to a settlement within the same term, had there been no laches on his part, and had the death of the judge been the sole obstacle standing in the way of the settlement. Defendant's right to settle being extended until the following term, it is idle to contend that the death of the judge who ordered the continuance could leave the defendant in the position of having no remedy except a new trial as is argued here. Another judge was appointed before whom the matter should in due course have been taken up who, as the successor of his predecessor, could exercise the same powers and had the right to act upon every case that remained undecided upon the docket as fully as his predecessor could have done (re Life and Fire Insurance Co. *vs.* Wilson, 8 Peters 292; 8 Law Ed., 949, 953, and for cases holding that a succeeding judge can settle and sign bill of exceptions left unsettled by his predecessor see Bowden *vs.* Wilson, 21 Florida, 168; Ketcham *vs.* Hill, 42 Indiana, 70).

The above considerations are, however, more or less beside the point since, as plaintiff in error points out in his brief (p. 8), he elected to have the rights he claims decided by this court on the record which he has presented, in preference to availing himself of the opportunity to settle his bill of exceptions afforded by the order of continuance issued by the court below, and of the opportunity to file it as part of the record here in compliance with both the words and spirit of the order issued by this court when it denied the motion of the defendant in error to docket and dismiss.

II. That the absence of the bill of exceptions affords no ground for dismissal, since on the record presented there is

an obvious error of which this court will take notice and decide accordingly.

The record shows that on December 3, 1910, when the case was set for retrial, the attorney for the defendant below moved for a continuance of at least five days, alleging as grounds for such motion that he could not properly prepare his case and assemble his witnesses before that time. The court denied the motion, attorney for the defendant retired from the court room, the trial was had, and a verdict for $7,000 was sent in. This, counsel contends, was a deprivation of the constitutional right to a hearing, to which defendant was entitled, and constitutes the obvious error assigned.

Counsel cites the case of Roller *vs.* Holly, 176 U. S., 398, the salient facts of which are set out on page 10 of his brief, in support of this contention. But he overlooks the point that in that case the facts were so presented to this court that it was enabled to review them. They became incorporated in the record on an agreed statement of facts, which is distinctly not the case here.

This court has repeatedly held that an affidavit offered in a case is not part of the record unless brought up by an agreed statement of facts, special verdict or bill of exceptions (Clune *vs.* U. S., 159 U. S., 590; 40 Law Ed., 269; Nelson *vs.* Flint, 166 U. S., 226; 41 Law Ed., 1002; Evans *vs.* Stettnisch, 149 U. S., 605; 37 Law Ed., 866).

In the recent case of Pickett *vs.* United States (216 U. S., 458, 461; 54 Law Ed., 566, 569), this court said:

> "The remainder (of the assignments of error) is for denying a continuance. Continuances are within the discretion of the court, and unless great abuse is shown the action of the court below will not be disturbed. As no bill of exceptions was taken we have no showing of abuse upon which the action of this court may be invoked" (see also Isaacs *vs.* U. S., 159 U. S., 487; 40 Law Ed., 229; Goldsby *vs.* U. S., 160 U. S., 70; 40 Law Ed., 344; Campbell *vs.* Rankin, 98

U. S., 261; 25 Law Ed., 435; Hannah *vs.* Maas, 122 U. S., 24; 30 Law Ed., 1117; United States *vs.* Taylor, 147 U. S., 695; 30 Law Ed., 335; Baltimore and Potomac Ry. Co. *vs.* Trustees, etc., 91 U. S., 127; Freeman on Judgments, sec. 79).

Counsel contends that the court below abused its powers, and desires this court to act in accordance with this assumption. But this court is limited in the exercise of its powers of review to what is before it in the record. All that is before it is that the defendant below moved for a continuance, which was denied by the trial court.

This is but the exercise of the ordinary discretionary powers of a trial court, and therefore does not *per se* constitute error on the face of the record. As the cases above cited show, abuse of these powers is not to be presumed; the only way to show such abuse is to incorporate the facts substantiating it in the record in the methods provided by law. As this was not done the question is not presented here.

Prayer for Damages.

Defendant in error respectfully prays the court, in view of the above representations, to award damages in his favor to the extent of 10 per cent of the judgment rendered by the District Court of Porto Rico, together with interest running from the date of said judgment. That the writ of error was taken for purposes of delay only is, it is thought, made plainly manifest by the following facts which appear of record:

First. Plaintiff in error failed to docket his case within the time prescribed by rule 9 of this court, and made no effort to obtain an extension of time on or before the expiration of that period.

Second. When in accordance with the order of this court of April 24, 1911, plaintiff in error was granted a reasonable time to docket his case after settling the bill of exceptions, he

made no effort whatsoever to comply with the order of this court and settle said bill, which he was enabled to do [although after the expiration of the term in which it properly came up for settlement] both by this court's order of April 24, 1911, and by the order of the district judge of April 4, 1911. It is obvious that he never intended to comply with the spirit of the order of this court, nor to avail himself of the opportunity afforded by the district judge to settle the bill of exceptions in the following term, for he caused to be docketed on May 3, 1911, the record in this cause containing no bill of exceptions whatsoever. On page 6 of his brief counsel states that the transcript of record, *ex necessitati rei*, does not contain any bill of exceptions. This would be true only on the assumption that plaintiff in error was in duty bound to docket the case at that time; but he was, under the order of this court of April 24, 1911, not only at liberty to wait until the ensuing term to settle the bill before docketing it, but he was both by the order of this court and the order of the district judge morally bound to do so. The death of the district judge had nothing to do with his precipitous action, because Judge Jenkins did not die until five weeks after the case was docketed. It seems perfectly plain that the failure of this record to contain a bill of exceptions arose not, as is contended, from the necessity of the case, but from a wilful disregard of the spirit of the order of this court of April 24, 1911, and of the rights which plaintiff in error might have exercised had he chosen to settle the bill of the ensuing term as allowed by the order of the district judge.

Third. As appears from page 4 of the brief of defendant in error in support of this motion, plaintiff in error disregarded the duty imposed upon him by rule 8, paragraph 1, to serve the defendant in error or his counsel with a copy of the *præcipe* filed with the clerk of the court indicating the portions of the record to be incorporated into the transcript on appeal.

Fourth. Ever since the 14th day of August, 1911, on which the April term of the District Court for Porto Rico was opened by the judge who succeeded Judge Jenkins, it was within the power of the plaintiff in error to at least attempt to bring about the settlement of the bill of exceptions contemplated by the order of this court of April 24, 1911. As shown by the affidavit of the clerk of the District Court of Porto Rico, quoted in full on pages 6 and 7 of the original brief filed in support of this motion, no attempt of any kind whatsoever has been made by the plaintiff in error. It is thought that the above facts are more than sufficient to show that the writ of error was applied for for purposes of delay only and under circumstances which fully justify the prayer for damages above presented. On this particular point the undersigned begs to refer the court to the following decisions: West Wisconsin Ry. Co. *vs.* Foley, 94 U. S., 100; 24 Law Ed., 71; Hennessy *vs.* Sheldon, 12 Wallace, 440; 20 Law Ed., 446; Nelson *vs.* Flint, 176 U. S., 266; 41 Law Ed., 1002.

Respectfully submitted,

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